IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| NEUBERGER and SCOTT | : | CIVIL ACTION |
| | : | |
| v. | : | |
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| WILLIAM SHAPIRO, ET AL. | : | No. 97-7947 |

**Ludwig, J.** **November 24, 1998**

**MEMORANDUM**

Plaintiffs Werner Neuberger and Louis Scott move for class certification under Fed. R. Civ. P. 23(b)(3).

This is an action for violations of §§ 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77o. The complaint alleges that from December 1994 to August 1997 securities filings relating to Equipment Leasing Corporation of America (ELCOA) contained material misrepresentations for which defendants are legally responsible.[1] There is also a supplemental claim for common law negligent misrepresentation. The relief requested consists of compensatory damages as well as a constructive trust of

[1] Defendants are: William Shapiro, president of ELCOA and member of its board of directors; Kenneth S. Shapiro, vice president and director of ELCOA; directors Lester Shapiro, Nathan Tatter, John B. Orr, and Adam Varrenti, Jr.; Welco Securities, Inc., a registered broker/dealer that underwrote activities related to ELCOA certificates; R.F. Lafferty & Co., a registered broker/dealer that issued an opinion of fairness in pricing of ELCOA certificates; Cogen, Sklar L.L.P., an accounting firm that issued opinions on financial statements of ELCOA; and William Shapiro, Esq., P.C., a law firm owned and operated by defendant William Shapiro who served as counsel in preparation of offering materials. ELCOA has not itself been named because it is subject to the protection of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. Compl. ¶¶ 9-21.

defendants' assets.

Plaintiffs' motion defines the proposed class as follows:

> All persons who purchased Fixed Rate or Demand Certificates (collectively "Certificates") from Equipment Leasing Company of America (ELCOA) on or after December 23, 1994, including persons who rolled over Certificates which were issued before December 23, 1994 into a new certificate (the "Class").[2]

Mot. at 1.

For the reasons here set forth, the motion will be granted as to the federal law counts.

## I. Federal Securities Claim

To obtain certification, plaintiffs must satisfy the four requirements of Fed. R. Civ. P. 23(a),[3] together with those of Rule 23(b)(3). Amchem Products, Inc. v. Windsor, 521 U.S. 591, ___, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997).

1. Numerosity - The class must be "so numerous that joinder is impracticable." Fed. R. Civ. P. 23(a)(1). According to

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[2] Excluded are all defendants, their families, heirs, successors and assigns, and any corporation, partnerships, estates or trusts controlled by defendants, as well as any subsidiary or affiliate. Pls. mot. at 1.

[3] Rule 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

plaintiffs, the number of members exceeds 1,000, and the class is dispersed geographically. Pls. mem. at 8,9; reply at 3. See Deutschman v. Beneficial Corp., 132 F.R.D. 359, 371 (D. Del. 1990) ("Plaintiff need not allege the precise number of putative class members in order to establish numerosity."). Another consideration is the relatively small minimum amount needed to invest in ELCOA certificates - $100. Separate suits would be impracticable. Reply at 3. See also Amchem Products, Inc. v. Windsor, 521 U.S. at ___, 117 S.Ct. at 2246, 38 L.Ed.2d 689.

Defendants' objections to numerosity - that the class members are easily identifiable, Cogen mem. at 18-19, and that the plaintiffs' estimate of class size has fluctuated, Lafferty mem. at 25-27 - are not persuasive. Plaintiffs' lowest estimate of 700 class members, Lafferty mem. at 26, is more than enough for numerosity. The reduction in class size appears to be the result of discovery. That these members may eventually be identified does not itself make multiple joinder feasible.

2. Commonality - Putative class members need not share identical claims. See Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir. 1988). What must be shown is that named plaintiffs "share at least one question of fact or law with the grievances of the prospective class." Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994).

Here, commonality is met in the recitation of five specific issues summarized in plaintiffs' motion. These are in the form of

questions[4] relating to the overall claim that defendants engaged in a fraudulent course of conduct resulting in artificially inflated stock prices. See pls. mot. at 9-10.[5]

3. Typicality - While similar to commonality, "[t]he typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members . . .." Rosen v. Fidelity Fixed Income Trust, 169 F.R.D. 295, 298 (E.D. Pa. 1995) (quoting Baby Neal, 43 F.3d at 57). Because the allegations here include a common course of fraudulent conduct on the part of defendants and the same type of monetary harm to all putative class members, typicality is satisfied.

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[4] The questions are:

> (a) Whether the federal securities laws were violated by defendants' acts [];
> (b) Whether defendants participated in and/or pursued the course of conduct alleged in the complaint;
> (c) Whether documents, including those disseminated to the members of the Class and those filed with the SEC, omitted and/or misrepresented material facts about the business affairs and financial condition of ELCOA;
> (d) Whether plaintiffs and the members of the Class paid artificially inflated prices for the ELCOA Certificates due to the nondisclosure and/or misrepresentations alleged in the complaint; and
> (e) Whether the Class has sustained damages and, if so, the proper measure of those damages.

Pls. mot. at 9-10.

[5] Defendant R.F. Lafferty's dispute as to commonality, Lafferty mem. at 28-34, is more suitably considered under typicality.

Defendants raise several objections: (1) plaintiffs cannot show reliance and materiality because they did not rely on the offering materials when purchasing the certificates, Cogen mem. at 11-14, Lafferty mem. at 30-31, Shapiro mem. at 8-9; (2) plaintiff Neuberger is subject to a statute of limitations defense having rolled-over his certificates, id. at 15-16; (3) Lafferty issued a fairness opinion only as to the September 1995 prospectus and not 1996 or 1997, Lafferty mem. at 31-32; (4) the first prospectus that included financial statements audited by Cogen did not become effective until January 6, 1995, Cogen mem. at 9; (5) named plaintiffs admitted that R.F. Lafferty did not violate a duty as to them, Lafferty mem. at 28-29; and (6) named plaintiffs purchased fixed-rate certificates and cannot represent holders of demand certificates, Lafferty mem. at 38-39.

As to the existence of so-called unique defenses, these entail the merits of the case, which are not within the purview of a motion for class certification.[6] See Seidman v. American Mobile Systems, Inc., 157 F.R.D. 354, 361 (E.D. Pa. 1994) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974)). See also Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 924 (3d Cir. 1992) ("'Given a sufficient

[6] Because reliance is not an element of a claim under § 11 of the Securities Act of 1933, and materiality is determined by a "reasonable investor" standard, In re Donald J. Trump Casino Securities Lit., 7 F.3d 357, 369 (3d Cir. 1993), it is difficult to see how either will be a valid defense. Also, to the extent that a statute of limitations defense can be made to a roll-over purchase, this would presumably affect other putative class members and would not be unique to Neuberger.

nucleus or common questions, the presence of the individual issue of compliance with the statute of limitations has not prevented certification of class actions in securities cases.'") (quoting Cameron v. E.M. Adams & Co., 547 F.2d 473, 478 (9th Cir. 1976)); Gunter v. Ridgewood Energy Corp., 164 F.R.D. 391, 395-96 (D. N.J. 1996) (rejecting defendants' argument that a statute of limitations defense rendered named plaintiffs' claim atypical). "If defendants' course of conduct gives rise to the claims of all class members, and defendants have not taken any action unique to the named plaintiff, then the representative's claim is typical." Deutschman, 132 F.R.D. at 373 (citations omitted). Moreover, the class can be subdivided or otherwise modified if it becomes necessary to separate out various defenses.[7]

Defendants' two other objections also do not vitiate typicality. Named plaintiffs' testimony that defendant R.F. Lafferty did not violate a duty as to them was in response to a deposition question that called for a legal conclusion. Without factual specificity or clarification, the expression of such an opinion by a lay person is entitled to little, if any, weight. Moreover, factual distinctions that exist among putative class members' claims, including the difference between fixed rate and

[7] Specifically, as to R.F. Lafferty and Cogen Sklar, if the proposed class period overstates their alleged involvement, these objections may be dealt with by redefining the class or creating sub-classes.

demand certificates, are insufficient by themselves.[8] "'Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it based on the same legal theory.'" Baby Neal, 43 F.3d at 58 (quoting Hoxworth, 980 F.2d at 923).

4. Adequacy - In order to establish that named plaintiffs will fairly and adequately protect class interests, "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Hoxworth, 980 F.2d at 923. Defendants bear the burden of proving inadequacy. Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir.), abrogation on other grounds recognized, Garber v. Lego, 11 F.3d 1197 (3d Cir. 1993), cited in Hoffman Elec., Inc. v. Emerson Elec. Co., 754 F. Supp. 1070 (W.D. Pa. 1991).

Defendants contest the representational adequacy of named plaintiffs, first for their lack of knowledge about the legal basis of the case and for not having vigorously represented the proposed class. Cogen mem. at 16-18; Lafferty mem. at 41-50; Shapiro mem. at 11-15. Secondly, they argue that the failure to inform named plaintiffs of their obligation to pay costs and attorney fees demonstrates counsel's incompetence for purposes of Rule 23(a)(4).

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[8] Plaintiffs also note that the registration statements in question were issued for both demand and fixed rate certificates without distinction. Reply at 10.

Lafferty mem. at 49.

While it is true that named plaintiffs' deposition testimony did reflect a lack of knowledge as to many aspects of the case, "'[i]t is unrealistic to require a class action representative to have an in-depth grasp of the legal theories of recovery behind his or her claim.'" In re Cephalon Securities Lit., 1998 WL 470160 at *3 (E.D. Pa. 1998) (quoting Barnes v. American Tobacco Co., Inc., 176 F.R.D. 479, 485-86 (E.D. Pa. 1997), aff'd __ F.3d __, 1998 WL 783960 (3d. Cir. 1998). See also In re Frontier Ins. Group, Inc. Securities Lit., 172 F.R.D. 31, 46 (E.D.N.Y. 1997) ("'[I]n the context of complex securities litigation, attacks on the adequacy of the class representative based on the representative's ignorance or credibility are rarely appropriate.'") (quoting County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1416 (E.D.N.Y. 1989), aff'd 907 F.2d 1295 (2d Cir. 1990)).

As in all litigation, plaintiffs' counsel are obligated to keep their clients informed of the progress of the case - and, in this type of litigation, to make clear the duties and obligations of would-be class representatives.[9] Here, plaintiffs Neuberger and

[9] Specifically, as to the plaintiffs' obligation for costs and attorney fees pursuant to 15 U.S.C. §§ 77k(e), 77u-4(c)(2),(3)(A), it is necessary for counsel to apprise named plaintiffs of the potential financial burden they undertake. See, e.g., Berger v. Jasmine Ltd., No. 97-cv-2318 (D.N.J. 1998) (plaintiff counsels' failure to inform client of responsibility for costs "weighed heavily" against attorneys' competency in class action suit). However, this factor is not fatal to a determination of adequacy in this case. Here, counsel agreed to represent plaintiffs on a contingency basis and therefore undertook to advance all costs. Reply at 21. See, e.g., Seidman, 157 F.R.D. at 365-66 (rejecting challenge to plaintiff's adequacy on grounds of inability to fund

Scott appear to have sufficient knowledge of the basic facts. Also, they sought out counsel who have substantial prior experience in class action securities litigation, reply, ex. 3, and who have demonstrated apparent competence in this case.[10] They also profess willingness to act vigorously on behalf of class members. See reply at 17-19. Moreover, nothing suggests that named plaintiffs are antagonistic to the interests of the putative class. They possess the same interests and claim to have sustained the same injury. See Deutschman, 132 F.R.D. at 374. Accordingly, defendants have not met their burden of showing that plaintiffs are inadequate or would not perform their role as class representatives.

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costs of litigation where counsel was working on contingent fee basis) (citing Vanderbilt v. GEO-Energy Ltd., 725 F.2d 204, 210 (3d Cir. 1983)); In re ML-Lee Acquisition Fund II, L.P. Securities Lit., 848 F. Supp. 527, 560 (D. Del. 1994) (named plaintiff's unwillingness to pay costs in light of contingency fee agreement did not render plaintiff inadequate representative).

[10] R.F. Lafferty's suggestion that plaintiff counsel are inadequate because they did not fulfill the early notification requirement of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §77z-1(a)(3)(A), is incorrect. Lafferty mem. at 47. Requisite notice was sent out on December 20, 1997 - the day after the complaint was filed - and the parties and the court were so informed at a conference held in March, 1998. Pls. supp. reply at 1, 4.

Plaintiffs have also fulfilled Rule 23(b)(3).[11]

1. Predominance of common issues - This inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at ___, 117 S.Ct. at 2249, 138 L.Ed.2d 689. Here, common questions as to the existence and materiality of misrepresentations and omissions in the offering materials favor certification. Moreover, a class action will achieve "economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." Advisory Committee's Notes on Fed. F. Civ. P. 23(b)(3).

Although defendants point out the multiplicity of offering materials in question, see e.g., Cogen mem. at 20-25, the same purported misstatements of fact and flawed accounting methods are asserted as to each of them. Reply at 24-25. Evidentiary issues as to misrepresentations and materiality will be substantially identical for all class members. See, e.g., Rosen, 169 F.R.D. at 301 (certifying securities action class where several registration statements formed the basis of the claim); Lerch v. Citizens

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[11] Rule 23(b)(3):

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

First Bancorp., 144 F.R.D. 247, 252 (D.N.J. 1992) (predominance shown because all class members sought determination that defendants misrepresented and omitted material facts in violation of federal securities law).[12]

2. Superiority - As articulated by our Court of Appeals, "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on securities laws 'since the effectiveness of those laws may depend in large measure on the application of the class action device.'" Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.) (citations omitted), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L. Ed. 2d 290 (1985), cited in In re Scott Paper Co. Securities Lit., 142 F.R.D. 611, 614 (E.D. Pa. 1992). In part the reason is that the class action mechanism overcomes the "'problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" Amchem, 521 U.S. at ___, 117 S.Ct. at 2246, 138 L.Ed.2d 689 (citations omitted). That principle applies here. By certifying the proposed class, numerous individuals, many of whom have claims too small to bring individual suits, will obtain court access to litigate whether or not the federal securities law has been violated.

Apart from the policy of encouraging class actions in

[12] As to the effect of potential defenses, to the extent they exist, they do not outweigh the common issues shared by the proposed class. See discussion infra at 5, n.6.

securities cases, defendants posit that on-going ELCOA bankruptcy court proceedings afford a superior forum for dealing with putative class members' claims. Cogen mem. at 28-30; Shapiro mem. at 19-23. No authority for that position has been offered, nor evidence of any steps taken in the bankruptcy to protect the putative class.[13] Different rationales and considerations underlie a bankruptcy proceeding and a civil action to enforce the federal securities law. From the standpoint of the putative class, good reasons have not been advanced to stay or dismiss this action because of the pendency of the bankruptcy. See order, July 17, 1998 (denying defendants' motion to dismiss, which, in part, argued that the Bankruptcy Court was the proper venue for this action). On the contrary, the Bankruptcy Court would appear to have jurisdiction only over ELCOA and not over defendants in this action; trial by jury, which has been demanded by plaintiff, would be unavailable over any defendant's objection, 28 U.S.C. § 157(d)(e); and no individual class members have filed claims as unsecured creditors in the bankruptcy proceeding. Defendants' contention, therefore, must be rejected.

[13] The creditor's committee's "indicat[ion] of a willingness" to pursue the claims of ELCOA certificate holders, Cogen mem. at 30, does not impel the conclusion that the class members' rights should be determined in the bankruptcy case.

II. State Law Claim

Class certification for the common law claim of negligent misrepresentation is also sought. Compl. ¶¶ 95-105. However, for the following reason, certification will be denied as to this count.

Common law misrepresentation requires actual and reasonable reliance on the matters alleged to have been misstated. See In re Herley Securities Litigation, 161 F.R.D. 288, 292 (E.D. Pa. 1995); In re Scott Paper Co. Securities Lit., 142 F.R.D. at 617. A disparity in judicial views exists on whether individual issues of reliance should predominate over common issues. Compare In re Cephalon, 1998 WL 470160 at *4 (E.D. Pa. 1998) (certifying class as to negligent misrepresentation claim) and In re Scott Paper, 142 F.R.D. at 617 (denying certification).

Here, certification as to the state law claims will be denied because the named plaintiffs do not come within the requisites of Rule 23(a). According to their deposition testimony, neither Mr. Neuberger nor Mr. Scott had read the registration statements before purchasing their ELCOA certificates. See, e.g., Cogen mem. at 5-7. While some members of the proposed class may be able to evidence reliance,[14] the named plaintiffs cannot. Therefore, their claims are not typical with respect to the misrepresentation counts. See, e.g. In re Frontier Ins. Group, Inc., 172 F.R.D. at 41 ("The

[14] The number of putative class members who would claim to have relied on the offering materials has not been submitted and at this point is, arguably, a matter of speculation.

instances in which courts deny class certification based on defenses uniquely applicable to potential class representatives are generally those where a full defense is available against the plaintiff's individual action . . . ."). For this reason, it is questionable whether plaintiffs can be adequate class representatives with respect to the state law issues.

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**ORDER**

AND NOW, this 24th day of November, 1998, plaintiffs' motion for class certification is ruled on as follows:

Granted, as to the claims brought under §§ 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77o. Fed. R. Civ. P. 23(a), (b)(3). The class shall consist of all persons who purchased fixed-rate or demand certificates from Equipment Leasing Company of America (ELCOA) on or after December 23, 1994, including those persons who rolled-over certificates that were issued before December 23, 1994 into a new certificate. The class shall be represented by named plaintiffs Werner Neuberger and Louis Scott and may proceed against all named defendants.

Denied, as to the claim for common law negligent misrepresentation.

Edmund V. Ludwig, J.